

IN THE CIRCUIT COURT FOR DAVIDSON COUNTY, TENNESSEE  
TWENTIETH JUDICIAL DISTRICT AT NASHVILLE

2008 FEB 14 AM 8:08

STATE OF TENNESSEE, *ex rel.* )  
ROBERT E. COOPER, JR., )  
ATTORNEY GENERAL and )  
REPORTER, )

Plaintiff, )

v. )

CAREMARK Rx, L.L.C., )  
CAREMARK, L.L.C. and )  
CAREMARKPCS, L.L.C. formerly )  
known as ADVANCEPCS, )

Defendants. )

NO. 08C463

CIVIL LAW ENFORCEMENT COMPLAINT  
FOR INJUNCTIVE AND OTHER RELIEF

This civil law enforcement action is brought in the name of the State of Tennessee ("State"), by and through Robert E. Cooper, Jr., the Attorney General and Reporter ("Attorney General"), pursuant to Tenn. Code Ann. §§ 8-6-109, 47-18-108, and 47-18-114, and all common law powers and duties of the Attorney General. Mary Clement, Director of the Division of Consumer Affairs of the Tennessee Department of Commerce and Insurance ("Division"), having reason to believe that Caremark Rx, L.L.C., Caremark, L.L.C. and CaremarkPCS, L.L.C. formerly known as AdvancePCS (collectively hereinafter, "Caremark" or "Defendants") have violated and are continuing to violate the Tennessee Consumer Protection Act of 1977, Tenn. Code Ann. § 47-18-101 *et seq.*, has requested that this civil action against Defendants be commenced by the Attorney General. The Attorney General brings this action in the public interest.

## **JURISDICTION AND VENUE**

1. This action is brought for and on behalf of the Division of Consumer Affairs of the Department of Commerce and Insurance by Robert E. Cooper, Jr., the Tennessee Attorney General and Reporter, pursuant to the Tennessee Consumer Protection Act of 1977, Tenn. Code Ann. § 47-18-101 *et seq.*

2. This Court exercises jurisdiction over the subject matter of this Complaint pursuant to the provision of Tenn. Code Ann. §§ 47-18-108 and 47-18-114.

3. Venue is proper in Davidson County pursuant to Tenn. Code Ann. § 47-18-108(a)(3) because it is a county in which Defendants conduct or have conducted business at all times relevant to this Complaint.

4. Defendants waived ten (10) days notice of intent to sue under Tenn. Code Ann. § 47-18-108(a)(2).

## **PARTIES**

5. Plaintiff, the State of Tennessee *ex rel.* Robert E. Cooper, Jr., is the duly appointed Attorney General of Tennessee and, as such, has broad statutory and common law powers. The Attorney General is authorized to enforce the Tennessee Consumer Protection Act of 1977 (“Act”), Tenn. Code Ann. § 47-18-101 *et seq.* Under this Act, the Attorney General is authorized to seek any relief necessary to restore to any person who has suffered any ascertainable loss by reason of Defendants’ unlawful act or practice. Pursuant to Tenn. Code Ann. § 47-18-108, relief available includes, but is not limited to, extraordinary relief, restitution, attorneys’ fees and civil penalties.

6. Defendants Caremark Rx, L.L.C., Caremark, L.L.C., and CaremarkPCS, L.L.C. (collectively referred to as “Caremark” or “Defendants”) are Delaware Limited Liability companies that conduct business nationwide. The Defendants’ operations are conducted primarily through Caremark L.L.C., a wholly-owned, indirect subsidiary of Caremark Rx and CaremarkPCS (f/k/a AdvancePCS), a wholly-owned, direct subsidiary of Caremark Rx. Caremark Rx acquired AdvancePCS on March 24, 2004. Caremark provides pharmacy benefit management services to over 2,000 health plan clients servicing persons in Tennessee and nationwide.

7. The executive offices of Caremark Rx, L.L.C. are located at 211 Commerce Street, Suite 800, Nashville, Tennessee 37201. Caremark operates, or has operated, seven prescription drug mail order pharmacies in the states including but not limited to mail order pharmacies located in Alabama, Arizona, Florida, Illinois, Pennsylvania, and Texas.

8. Caremark operates, or has operated, a retail pharmacy network with over 59,000 participating pharmacies.

9. Caremark operates, or has operated, a prescription drug repackaging facility in Northbrook, Illinois, located in Cook County, Illinois.

### **COMMERCE**

10. The Tennessee Consumer Protection Act of 1977, defines “trade” and “commerce” in Tenn. Code Ann. § 47-18-103(11) as follows:

“Trade,” “commerce,” or “consumer transaction” means the advertising, offering for sale, lease or rental, or distribution of any goods, services, or property, tangible or intangible, real, personal, or mixed, and other articles, commodities, or things of value wherever situated.

11. Defendants were at all times relative hereto, engaged in trade and commerce in the State of Tennessee, to wit: advertising, soliciting, offering for sale, and providing pharmacy benefit management services to Tennessee health plans and employers, including government employers.

### **DEFENDANTS' COURSE OF CONDUCT**

Pursuant to the Attorney General's Investigation and upon information and belief, Plaintiff alleges the following:

12. Many Americans have a health benefit which includes a pharmacy benefit component that pays for prescription drugs, in whole or in part. Whether provided by an employer, a health plan, a government agency, a union or another entity (the "client" or "Client Plan"), this pharmacy benefit is typically managed by a pharmacy benefit manager ("PBM") such as Caremark. A PBM is a business which specializes in administering the pharmacy benefit in return for payment – in some form – by the Client Plan.

13. According to Caremark, it is one of the nation's leading PBMs based on 2006 net revenues of approximately \$36.8 billion.

14. As a PBM, Caremark represents that it performs the following services:

- a) Organizing a network of retail pharmacies ("retail network") that agree to fill prescriptions for a negotiated price. The retail network may consist of some or all of the approximately 59,000 retail pharmacies in the United States;
- b) Operating mail order pharmacies which sell prescription drugs, including more than 516 million prescriptions in 2006, directly to persons with a pharmacy benefit ("Plan Participants");
- c) Administering the pharmacy benefit by processing and paying claims through the operation of a proprietary computer system;

- d) Providing Plan Participants, physicians, and Client Plans with information about the operation of their pharmacy benefit and cards or other methods to access the benefits; and,
- e) Developing and managing formularies, as described further below.

15. Formularies are lists of drugs for which a Client Plan agrees to pay on behalf of the Plan Participant, either in whole or in part. For example, “open formularies” permit payment for any prescription drug. “Closed formularies” limit payment to specific drugs – for example, only generics, or only one preferred brand drug within a so-called “therapeutic class.” “Tiered formularies” require Plan Participants to pay lower or higher co-pays depending on whether a drug is a generic, preferred brand, or non-preferred brand.

16. Caremark enters into contracts with drug manufacturers in which the manufacturer agrees to pay rebates to Caremark based on placement of a manufacturer’s drug on a formulary.

17. Many drug manufacturers pay Caremark “base” rebates, typically calculated by applying a flat percentage to Caremark’s purchases of that manufacturer’s drugs.

18. Many manufacturer contracts also contain more targeted rebates that are tied to specific sales or performance goals. For example, manufacturers will typically pay Caremark “market share” or “performance” rebates, where Caremark is paid a percentage rebate on a sliding scale, that is tied to an increase in the market share for a specific drug.

19. Caremark provides mail order pharmacy services to Client Plans including governmental entities and private parties.

20. While managing its clients’ prescription drug benefits, Caremark engages in a “therapeutic interchange” or “drug switching” program, in which certain drugs that physicians prescribed for Plan Participants are targeted by Caremark for a switch from the prescribed drug to a different drug.

21. Caremark's drug switching programs are determined largely by Caremark's desire to maximize its receipt of rebates from drug manufacturers.

22. When Caremark solicits prospective and existing Client Plans, Caremark fails to clearly and conspicuously disclose material information about its drug switching programs, including the fact that it will retain rebates that it receives from the drug manufacturers as a result of drug switching.

23. Caremark represents to physicians and to Plan Participants that drug switches save Plan Participants and/or the Client Plan money, when that is not necessarily the case. In fact, some drugs to which Plan Participants are switched actually cost more or approximately the same amount as the originally prescribed drug.

24. With respect to certain drug therapies, a switch from one drug to another in the same therapeutic class often requires the Plan Participant to undergo one or more tests, and may require one or more doctor visits, to monitor the new drug therapy and ensure the new drug's efficacy. Plan Participants would not have incurred these additional health care costs but for Caremark's drug switches.

25. Caremark, in its contracts with retail network pharmacies, fails to require the pharmacy to disclose to the Plan Participant if the pharmacy's usual and customary ("U&C") price for the drug is less than the applicable co-payment and fails to require the retail pharmacy to allow the Plan Participant to pay the U&C price, if it is lower than the applicable co-payment.

26. Caremark engages in a variety of programs and activities for which drug manufacturers and other business entities pay Caremark to perform. For example, Caremark sells various kinds of data it derives from its records of prescription sales to Plan Participants.

Caremark distributes this information and marketing materials to physicians and Plan Participants to promote particular drugs to those physicians and Plan Participants.

27. Caremark also enters into contractual agreements with drug manufacturers to market and promote specific drugs to physicians, through mailings and other communications with those physicians.

28. Caremark fails to clearly and conspicuously disclose to Client Plans and physicians that it engages in these marketing and promotional activities on behalf of drug manufacturers, that it receives fees from the drug manufacturers for performing these activities, and that it collects those fees for its own benefit.

29. Previously dispensed drugs are sometimes returned to Caremark's mail order pharmacies, either because the drug could not be successfully delivered to the Plan Participant, or because the drug was returned or rejected by the Plan Participant, or for some other reason.

30. Since at least 1999, through at least June 2003, Caremark has restocked and re-shipped previously dispensed drugs that have been returned to its mail order pharmacies.

31. Caremark fails to clearly disclose to Plan Participants that it restocks and re-ships previously dispensed drugs.

32. Caremark, itself and through the mail order pharmacies, is engaged in the practice of pharmacy and is licensed to do so under the laws of various states in which its mail order pharmacies are located. As a licensed pharmacy, Caremark owes certain duties to the Plan Participants whose prescriptions it receives, fills, or arranges to fill.

33. Caremark employs licensed professional pharmacists and licensed, certified, or designated pharmacy technicians who perform or assist in performing professional pharmacy services for Plan Participants.

34. Caremark represents to Client Plans and to Plan Participants, directly or by implication, that it will provide the same professional pharmacy services performed by professional pharmacists at non-mail order pharmacies. These services, if properly performed, assure quality of care for Plan Participants through prevention of adverse drug interactions, verification of drug strength and dosage regimens, recommendation of alternative medically appropriate drugs, and monitoring outcomes.

35. Caremark has committed unfair or deceptive acts or practices through its violation of pharmacy ethics by:

- a) failing to fully disclose to Plan Participants, Client Plans, and physicians all of the material facts concerning proposed drug switches, including the nature and amount of Caremark's financial interest, and savings to the Plan Participant and the Client Plan, if any; and
- b) failing to require that its pharmacists form an independent, professional judgment about the propriety of a drug switch before proposing it, and by promoting protocols and work environment that operate counter to this obligation.

#### **APPLICABLE STATUTE**

36. The Tennessee Consumer Protection Act of 1977 states in relevant part as follows:

**47-18-104. Unfair or deceptive acts prohibited.** -- (a) Unfair or deceptive acts or practices affecting the conduct of any trade or commerce constitute unlawful acts or practices and are Class B misdemeanors.

(b) Without limiting the scope of subsection (a), the following unfair or deceptive acts or practices affecting the conduct of any trade or commerce are declared to be unlawful and in violation of this part:

(2) Causing likelihood of confusion or of misunderstanding as to the source, sponsorship, approval or certification of goods or services. This subdivision (b)(2) does not prohibit the private labeling of goods and services;



(5) Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits or quantities that they do not have or that a person has a sponsorship approval, status, affiliation or connection that such person does not have;

(6) Representing that goods are original or new if they are deteriorated, altered to the point of decreasing the value, reconditioned, reclaimed, used or secondhand;

(7) Representing that goods or services are of a particular standard, quality or grade, or that goods are of a particular style or model, if they are of another; and

(27) Engaging in any other act or practice which is deceptive to the consumer or to any other person.

**47-18-115. Construction.** -- This part, being deemed remedial legislation necessary for the protection of the consumers of the state of Tennessee and elsewhere, shall be construed to effectuate the purposes and intent. It is the intent of the general assembly that this part be interpreted and construed consistently with the interpretations given by the federal trade commission and the federal courts pursuant to § 5(A)(1) of the Federal Trade Commission Act (15 U.S.C. § 45(a)(1)).

## **VIOLATIONS OF LAW - TENNESSEE CONSUMER PROTECTION ACT**

Plaintiff hereby incorporates by reference and re-alleges each and every allegation contained in paragraphs 1 through 36 as set forth fully herein.

37. By engaging in the aforesaid conduct, Defendants have committed unfair or deceptive trade practices, in violation of the Tennessee Consumer Protection Act of 1977, Tenn. Code Ann. § 47-18-101 *et seq.*

38. By engaging in the aforesaid conduct, Defendants have violated the Tennessee Consumer Protection Act by committing acts and practices that are unfair or deceptive, in violation of Tenn. Code Ann. § 47-18-104(a).

39. Defendants' unfair or deceptive acts or practices violate at a minimum, Tenn. Code

Ann. § 47-18-104(a), (b)(2), (b)(5), (b)(6), (b)(7), and (b)(27), by:

- a) engaging in certain unfair and/or deceptive acts or practices and procedures at Caremark's mail order pharmacies, retail pharmacies, customer call centers, and corporate offices, related to Caremark's drug interchange practices, and disclosures to Client Plans, health care providers, prescribers, and Plan Participants concerning Caremark's drug interchange practices;
- b) engaging in certain unfair and/or deceptive acts or practices relating to disclosures to prescribers and Plan Participants relating to drug interchange practices and potential cost savings;
- c) engaging in certain unfair and/or deceptive acts or practices relating to Caremark's receipt of payment from pharmaceutical manufacturers for the distribution of information and materials to health care providers, prescribers, and Plan Participants, and disclosures to Client Plans, health care providers, prescribers, and Plan Participants concerning that practice, and the disclosure and retention of rebates and other payments received from pharmaceutical manufacturers;
- d) engaging in certain unfair and/or deceptive acts or practices relating to Caremark's disclosures to Client Plans, health care providers, prescribers, and Plan Participants related to Caremark's receipt of manufacturer payments;
- e) engaging in certain unfair and/or deceptive acts or practices relating to Caremark's practice of restocking returned drugs;
- f) engaging in certain unfair and/or deceptive acts or practices relating to Caremark's provision, or lack of a provision, in its contracts with retail network pharmacies requiring the pharmacy to disclose to the Plan Participants if such pharmacy's U&C price for the particular drug dispensed is less than the applicable co-payment;
- g) engaging in certain unfair and/or deceptive acts or practices relating to Caremark's provision, or lack of a provision, in its contracts with retail network pharmacies allowing the Plan Participant to pay either the co-payment or the U&C price, whichever is lower;
- h) engaging in certain unfair and/or deceptive acts or practices relating to provisions in Caremark's contracts with retail pharmacies regarding procedures that the retail pharmacies must follow when implementing a drug interchange as part of any Caremark drug interchange program; and

- i) engaging in certain unfair and/or deceptive acts or practices relating to compliance by Caremark pharmacists with pharmaceutical ethical principles and guidelines, to the extent failure to comply violated consumer protection statutes.

## **REMEDIES**

40. The Tennessee Consumer Protection Act, in relevant part, states as follows:

**47-18-108. Restraining orders and injunctions -- Penalty for violation. --**

- (a)(1) Whenever the division has reason to believe that any person has engaged in, is engaged in, or, based upon information from another law enforcement agency, is about to engage in any act or practice declared unlawful by this part and that proceedings would be in the public interest, the attorney general and reporter, at the request of the division, may bring an action in the name of the state against such person to restrain by temporary restraining order, temporary injunction, or permanent injunction the use of such act or practice.
- (a)(4) the courts are authorized to issue orders and injunctions to restrain and prevent violations of this part, and such orders and injunctions shall be issued without bond.
- (a)(5) Whenever any permanent injunction is issued by a court in connection with any action which has become final, reasonable costs shall be awarded to the state.
- (b)(1) The court may make such orders or render such judgments as may be necessary to restore any person who has suffered an ascertainable loss by reason of the use or employment of such unlawful method, act, or practice, or any money or property, real, person, or mixed, or any other article, commodity, or thing of value wherever situated, which may have been acquired by means of any act or practice declared to be unlawful by this part.
- (b)(4) The court may also order reimbursement of the state for the reasonable costs and expenses of investigation and prosecution of actions under this part, including attorneys' fees.
- (c) Any knowing violation of the terms of an injunction or order issued pursuant to subsection (a) or (b) shall be punishable by a civil penalty of not more than two thousand dollars

(\$2,000), recoverable by the state for each violation, in addition to other appropriate relief.

**47-18-114. Powers of the attorney general.** -- The attorney general and reporter, at the request of the division, may bring an action or proceeding in any court of competent jurisdiction pursuant to the provisions of this part.

**47-18-116. Costs.** -- No costs shall be taxed against the division in actions commenced under the provisions of this part.

### **PRAYER FOR RELIEF**

WHEREFORE, Plaintiff, State of Tennessee, *ex rel.* Robert E. Cooper, Jr., Attorney General and Reporter, pursuant to the Act, the Attorney General's general statutory authority, the Attorney General's authority at common law and this Court's equitable powers, prays:

A. That this Complaint be filed without cost bond as provided by Tenn. Code Ann. §§ 20-13-101, 47-18-108 and 47-18-116 and no court costs or litigation fees or costs of any sort be taxed against the State pursuant to Tenn. Code Ann. § 47-18-116;

B. That process issue and be served upon Defendants requiring Defendants to appear and answer this Complaint;

C. That this Court adjudge and decree that Defendants have each engaged in the aforementioned acts or practices which violate the Tennessee Consumer Protection Act of 1977;

D. That, pursuant to Tenn. Code Ann. § 47-18-108(a)(1) and (a)(4), this Court permanently enjoin Defendants, their agents, employees, and all other persons and entities corporate or otherwise in active concert or participation with any of them, from engaging in the aforementioned unfair or deceptive acts or practices which violate the Tennessee Consumer Protection Act of 1977, and that such orders and injunctions be issued without bond pursuant to Tenn. Code Ann. § 47-18-108.

E. That this Court make such orders or render such judgments as may be necessary to restore to any consumer or other person any ascertainable losses including statutory interest as that term is defined in Tenn. Code Ann. § 47-18-2102(1), including statutory interest suffered by reason of the alleged violations of the Tennessee Consumer Protection Act of 1977, and require that Defendants be taxed with the cost of distributing and administering the same, pursuant to Tenn. Code Ann. § 47-18-108(b)(1);

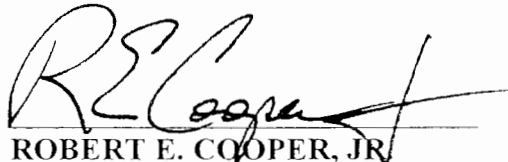
F. That this Court enter judgment against Defendants and in favor of the State for the reasonable costs and expenses of the investigation and prosecution of the Defendants' actions, including attorneys' fees, expert and other witness fees, as provided by Tenn. Code Ann. § 47-18-108(a)(5) and (b)(4);

G. That all costs in this case be taxed against Defendants pursuant to Tenn. Code Ann. § 47-18-116; and

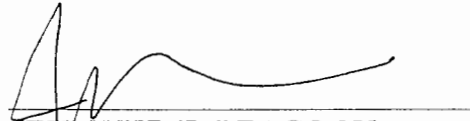
H. That this Court grant Plaintiff such other and further relief as this Court deems just and proper.

RESPECTFULLY SUBMITTED,

**FOR THE STATE OF TENNESSEE  
OFFICE OF THE ATTORNEY GENERAL  
& REPORTER**



**ROBERT E. COOPER, JR.**  
Attorney General & Reporter  
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